Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1996

KLAYMAN & ASSOCIATES, P.C., and
LARRY KLAYMAN,
Petitioners,

v.

BALDWIN HARDWARE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether sanctions entered against an attorney during the course of a trial may be affirmed, despite a *prima facie* showing of extra-judicial bias and prejudice on the part of the trial judge who imposed the sanctions, without at least reviewing the complete record, including the trial transcript, and a full airing of important arguments raise on appeal?

2. Whether sanctions entered against an attorney may be affirmed without consideration of whether appropriate procedural safeguards were employed, especially where a trial judge has acted as witness, prosecutor and judge?

3. Whether sanctions entered against an attorney may be affirmed without an express reference to the authority on which the sanctions are based?

4. Whether sanctions entered against an attorney pursuant to a court's inherent power or 28 U.S.C. § 1927 may be affirmed without an express finding of bad faith?

LIST OF PARTIES

Pursuant to S.Ct. Rule 29.6, the following is a list of parties and each corporate party's respective parent corporation and subsidiaries, if any.

Petitioner:

1. KLAYMAN & ASSOCIATES, P.C.

   A. Parent Corporation: None

   B. Subsidiaries: None

2. LARRY KLAYMAN

Respondent:

1. BALDWIN HARDWARE CORPORATION

   A. Parent Corporation: Masco Corporation

   B. Subsidiaries: None.

   C. Affiliates: FM Holdings, Inc.
   Galveston Houston Company
   Masco Tech, Inc.
   TriMas Corporation
   Payless Cashways, Inc.

Defendants:

1. FRANKSU ENTERPRISE CORPORATION

   A. Parent Corporation: None

   B. Subsidiaries: None

2. FRANK SU

3. DECORATORS ACCESSORIES, LTD.

   A. Parent Corporation: None

   B. Subsidiaries: None

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OPINIONS BELOW

The March 4, 1996 opinion of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") that gives rise to this petition is published at 78 F.3d 550. It is also reprinted in Appendix A hereto at App. 1-27. By an Order dated May 22, 1996, the Federal Circuit partially granted a petition for rehearing, making limited changes to the language of part of its March 4, 1996 opinion. This Order is reprinted in Appendix B at App. 28-29. Otherwise, the petition for rehearing was denied, as was the suggestion for rehearing *en banc*. The May 22, 1996 Order by which the Federal Circuit modified its March 4, 1996 opinion is reprinted in Appendix C at App. 30-32.

STATEMENT OF JURISDICTION

Petitioners, Klayman & Associates, P.C. and Larry Klayman, were counsel to defendants Franksu Enterprise Corporation, Frank Su and Decorators Accessories, Ltd. in the District Court action, which was brought pursuant to that court's federal question, patent and trademark jurisdiction, 28 U.S.C. § 1331, 1338 and 15 U.S.C. § 1121. Final Judgment was entered on December 14, 1992.

As the District Court action included claims for patent infringement, the appeal was heard by the Federal Circuit pursuant to 28 U.S.C. § 1292(c)(2) and 28 U.S.C. § 1295(a)(1). The Federal Circuit affirmed on March 4, 1996. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 22, 1996.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari is timely if filed within ninety (90) days of May 22, 1996, or by August 20, 1996.

RULES INVOLVED

Canon 2(A) of the Code of Conduct for United States Judges ("Judicial Code of Conduct") provides:

> A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3(A)(2) of the Judicial Code of Conduct provides:

> (2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

Canon 3(A)(3) of the Judicial Code of Conduct provides:

> (3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

Canon 3(A)(4) of the Judicial Code of Conduct provides:

> (4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full

> right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

Canon 3(B)(3) of the Judicial Code of Conduct provides:

> (3) A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer.

Canon 3(C)(1)(a) (c) and (d) of the Judicial Code of Conduct provides:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> > (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
> >
> > (c) the judge knows that, individually or as a fiduciary, the judge or the judge's spouse or minor child residing

> in the judge's household, has a financial interest in the subject mater in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.
>
> (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship or the spouse of such a person: (i) is a party to the proceeding or an officer, director or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Canon 3(C)(2) of the Judicial Code of Conduct provides:

> (2) A judge should keep informed about the judge's personal and fiduciary financial interests, and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

Canon 3(C)(4) of the Judicial Code of Conduct provides:

> (4) Notwithstanding the preceding provisions of this Canon, if a judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or has a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that

> could be substantially affected by the outcome), disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Canon 2(A) of the American Bar Association Model Code of Judicial Conduct ("ABA Model Code") provides:

> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3(B)(4) of the ABA Model Code provides:

> (4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Canon 3(B)(5) of the ABA Model Code provides:

> (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials or others subject to the judge's direction and control to do so.

Canon 3(D)(1) of the ABA Model Code provides:

> (1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises substantial questions as to the other judge's fitness for office shall inform the appropriate authority.

Canon 3(E)(1) (a) (c) and (d) of the ABA Model Code provides:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) a judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.
> >
> > (c) the judge knows that he or she, individually or as a fiduciary, the judge or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject mater in controversy or in a party to the proceeding or has any other more than de minimis interest that could be affected substantially by the outcome of the proceeding.

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding or an officer, director or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Canon 3(E)(2) of the of the ABA Model Code provides:

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

Canon 3(F) of the of the ABA Model Code provides:

F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate , the judge may participate in the proceeding. This agreement shall be incorporated in the record of the proceeding.

28 U.S.C. § 455(a) ("the statute") provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality night reasonably be questioned.

§ 455(b)(1) of the statute provides:

> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

§ 455(f) of the statute provides:

> (f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially effected by the outcome), disqualification is not required if the justices, judges, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for disqualification.

28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

This petition raises issues vital to the administration of our legal system, as it concerns not only the conduct of attorneys who practice before the courts, but also the conduct of the judges who preside over them, and the thoroughness and fairness with which questions about attorney and judicial conduct are reviewed on appeal.

Specifically, at issue is an amount in excess of $20,000 in monetary sanctions imposed on Petitioners by the District Court and the permanent revocation or disbarment of Petitioner Klayman's *pro hac vice* rights. These sanctions were affirmed by the Federal Circuit despite serious issues concerning the impartiality of the trial judge who imposed them, including the appearance of extra-judicial bias and prejudice against Petitioners, their clients, and various witnesses, all of whom were of either Jewish or Asian descent, as well as a potential financial conflict of interest.

Importantly, at oral argument, the panel of Federal Circuit judges presiding over this appeal ("the Panel") expressly stated that, due to the nature of the issues before it, a review

of the full trial transcript was absolutely necessary to render a fair opinion.[1] Nonetheless, it affirmed the District Court's sanctions without availing itself of the opportunity to do so.

The Federal Circuit also affirmed the District Court's sanctions despite acknowledging at oral argument that the Judicial Code of Conduct is more stringent than statutory provisions requiring disqualification. While Petitioners had relied on the Judicial Code of Conduct in support of their arguments that the trial judge's orders must not be given any force or effect due to the appearance of extra-judicial bias and prejudice and a financial conflict of interest, the Federal Circuit failed to address it in its decision. Likewise, the Federal Circuit ignored case law demonstrating that even the appearance of a conflict of interest or bias is sufficient to warrant disqualification.

Moreover, the Federal Circuit affirmed these sanctions despite Petitioner Klayman not having been accorded full due process rights before being effectively "disbarred" by the trial judge, including but not limited to adequate notice of the charges against him, the right to counsel, and a full evidentiary hearing before an impartial trier of fact.

Finally, in affirming these sanctions, the Federal Circuit employed standards that are in direct conflict with well-

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[1] Petitioners' efforts to secure a complete and fair review of the District Court's orders were continually frustrated by their inability to obtain a complete copy of the trial transcript, which, at that time, they could not afford, as it was estimated to cost in excess of $9,000.

established case law requiring an express recitation of the legal authority on which sanctions are based, as well as specific findings of bad faith where sanctions are imposed pursuant to a court's inherent powers or 28 U.S.C. § 1927.

Petitioners recognize that it may be difficult for any court to confront issues of judicial bias and prejudice. No one likes these kinds of cases. While it may have been difficult for the Federal Circuit, a highly-specialized "patent tribunal," to address emotionally-charged issues of judicial bias and prejudice, it is doubly hard for Petitioners to bring further attention to charges that have severely harmed their reputations and livelihoods by pursuing appellate remedies.[2]

However, appellate courts must be diligent in carrying out their oversight function if the attorney litigants who appear before them are to be afforded due process of law -- even in cases that raise issues that may be difficult to address. The Federal Circuit expressly declared the need to review the complete trial transcript, but failed in its admitted responsibility to do so. It also failed to address crucial arguments concerning the law to be applied in determining whether the trial judge should have been disqualified and the procedural safeguards to which Petitioners were entitled before the sanctions at issue could be imposed.

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[2] Adversaries of Petitioners have consistently cited the District Court's sanctions orders and the Federal Circuit's decision for tactical advantage in litigation, and some competitor law firms have even provided it to prospective clients to convince them not to hire Klayman & Associates, P.C. and Larry Klayman, Esq., but to hire their firm instead.

By perfunctorily affirming the District Court's sanctions in this manner, the Federal Circuit failed to address the serious issues about attorney and judicial conduct raised by Petitioners in their appeal. The resulting decision not only effectively denied Petitioners due process of law, but creates a dangerous precedent for the imposition of severe attorney sanctions that is directly at odds with the decisions of other Circuit Courts of Appeal ("the Circuits") in several substantial ways. Thus, a writ of *certiorari* is necessary so that this Court may exercise its supervisory power and resolve the conflicts among the Circuits created by this opinion. Only in this way can petitioners' important due process rights and the integrity of our judicial system be preserved.

Accordingly, this is a case of great precedential importance to the fair administration of professional standards of conduct for both attorneys and judges. Such fair administration is necessary not only to protect zealous advocacy by trial counsel (*see Model Code of Professional Responsibility*, Canon 7 (1979)), but also to preserve the confidence that the public at large must, by necessity, place in the American judicial system.

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI IS PROPER BECAUSE THE FEDERAL CIRCUIT'S AFFIRMANCE OF THESE SANCTIONS EFFECTIVELY DENIED PETITIONERS THEIR DUE PROCESS RIGHTS AND NECESSITATES AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A. Affirmance Without Review of the Trial Transcript.

In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court recognized the important, due process right to have an appeal adjudicated on a full trial record. As importantly, at oral argument, the panel of Federal Circuit judges reviewing this appeal acknowledged the need to review the trial transcript:

> [By the Court] "...the burden [of obtaining the complete trial transcript] is on this court now because [Baldwin] and Mr. [K]layman have both raised to us that the conduct before the trial judge of the lawyers is relevant to some resolution of a dispute between you. We need to know what the conduct was from the beginning to the end. Ordinarily we are only interested in the parts of the transcript that relate to a particular issue on appeal....But what you are two are both arguing about is the conduct over time of both parties, attorneys...So you can't be selective and just give us the things you want us to see. We have to see, or I assume we have to know what the conduct over time was of all of the lawyers, unfortunately we have to know that, if we're going to resolve the issues you all have proposed."

Appendix D at App.47 (Emphasis added).[3]

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[3] This acknowledgment was obviously based on the rules regarding "supplementation of the record" (*see Salinger v. Random House, Inc.*, 818 F.2d 252, 253 (2d Cir. 1987); Fed.R.App.P. 10, and the "doctrine of completeness" (*see Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988); *U.S. v. Burreson*, 643 F.2d 1344, 1349 (9th Cir. 1981), among others. *See also Williams v. St. Louis County*, 812 F.2d 1079, 1082-83 (8th Cir. 1987).

The Panel also confirmed that it would obtain the complete transcript through routine court procedures:

> "We have a procedure that we can request it and it's sent here within days. Our clerk does this routinely. I've done it on many occasions...."

Appendix D at App. 49.

Despite having expressly acknowledged the absolute need to review the entire trial transcript, and despite precedent from this Court emphasizing the importance of reviewing a trial transcript on appeal, *see Griffin*, *supra*, the Federal Circuit failed to review anything more than a few, distorted excerpts that Appellee had "cropped" from the trial transcript.[4] Moreover, the Federal Circuit also declined an offer by Appellee to provide seventy-five percent (75%) of the

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[4] Petitioner Klayman had initially attempted to obtain the transcript *in forma pauperis* and, to that end, submitted all necessary financial information. However, the Federal Circuit apparently lost this material, then denied the request on the basis that no supporting financial data had been submitted. Appendix A at App. 15. When Petitioners raised this issue in their petition for rehearing and suggestion for rehearing *en banc*, the Federal Circuit apparently admitted its mistake and revised the language of its opinion, but nonetheless denied the request without any underlying analysis. *See* Appendix C at App. 31. The Federal Circuit's treatment of Petitioner Klayman's *in forma pauperis* request regrettably demonstrates the reticent manner in which it shied away from addressing the core issues of the appeal over a period of nearly three and a half years.

transcript (*see* Appendix D at App. 47), and an offer by Petitioners to obtain the remainder.[5] Importantly, had the Federal Circuit availed itself of this opportunity, it would have found numerous instances of conduct -- including the trial judge's references to Petitioner Klayman as "Mr. Schmuckler," and references to Petitioners' client as "the artful Taiwanese dodger," among many others -- that created an appearance of religious and nationality-based extra-judicial bias and prejudice, thus requiring the trial judge's disqualification under 28 U.S.C. § 455(a), (b)(1) and/or Canon 3(C) of the Judicial Code of Conduct.[6] *See* Sworn Witness

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[5] In the three and a half years that passed between its filing and the final disposition of the appeal, Petitioners financial situation improved to enable it to make this offer.

[6] Importantly, this is not the first time that an appellate court has been asked to review, and has sought to correct, manifestations of extra-judicial bias and prejudice by this trial judge. In *U.S. v. Borrero-Isaza*, 887 F.2d 1349 (9th Cir. 1989), the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") found that remarks by the trial judge about the national origin of a Colombian defendant, among other factors, warranted reversal of a sentence. In that case, the trial judge had made an improper reference to "Mr. Borrero's ilk," as well as his lack of English language capability. *See Borrero-Isaza*, 887 F.2d at 1354. In this case, the same trial judge made derogatory references to Mr. Richard Carter, who is Jewish, as "Mr. Carter and his ilk," among other seemingly biased remarks and conduct. *See* App. at 55.

In *U.S. v. Hobbs*, 991 F.2d 569, 571, 574 (9th Cir. 1993), the Ninth Circuit found that the trial judge's characterization of a juror, whom he derisively described, without cause, as a

Affidavits at Appendices E and F, which were part of the record before the Federal Circuit. *See* Federal Circuit Docket Entry No. 31 at Exhibits 1 and 2.

By affirming the Districts Court's sanctions without reviewing the complete trial transcript, after acknowledging that a review of the complete transcript was necessary in order to render a fair decision on the appeal, the Federal Circuit denied Petitioners due process of law. In light of this *prima facie* denial of due process, an exercise of this Court's supervisory powers is necessary to ensure that all of the Circuits, not just this particular court, are diligent in carrying out their oversight functions so as to not only protect attorney rights, but also to preserve the integrity of and the public's confidence in the judicial system as a whole.

B. Affirmance Without Reference to Judicial Canons.

Canon 3 of the Judicial Code of Conduct for United States Judges provides:

> (3) A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer.

Judicial Code of Conduct, Canon 3(B)(3).[7]

"non-conformist," was inappropriate.

[7] Likewise, Canon 3 of the ABA Model Code states: "A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this code should take appropriate action. A judge having

Other portions of the Judicial Code of Conduct address such important issues as judicial impartiality and courtroom decorum. Specifically, Canon 2(A) of the Judicial Code of Conduct provides:

> A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3(A)(2) of the Judicial Code of Conduct provides:

> A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

Canon 3(A)(3) of the Judicial Code of Conduct provides:

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knowledge that another judge has committed a violation of this Code that raises substantial questions as to the other judge's fitness for office shall inform the appropriate authority." ABA Model Code, Canon 3(D)(1).

Moreover, the ABA Model Code makes clear that such conduct can be based upon courtroom behavior: "A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expressions and body language, in addition to oral communications, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial." Commentary to ABA Model Code, Canon 3(B)(5) (Emphasis added).

> A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

Canon 3(A)(4) of the Judicial Code of Conduct provides:

> A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law....

See also ABA Model Code, Canon 2(A) ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); ABA Model Code, Canon 3(B)(4) ("A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control."); ABA Model Code, Canon 3(B)(5) ("A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials or others subject to the judge's direction and control to do so.").

In addition, at oral argument the Panel itself referenced the Judicial Code of Conduct and acknowledged that its

provisions are more stringent than the requirements of 28 U.S.C. § 455 governing disqualification. *See* Appendix D at App. 52. Case law cited by Petitioners also confirmed that even an appearance of bias or financial conflict of interest is sufficient to warrant disqualification under 28 U.S.C. §455. *U.S. v. Tucker*, 78 F.3d 1313, 1324 (8th Cir. 1996) ("Under § 455(a) disqualification is required [and may be ordered by an appellate court] if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown."); *Moody v. Simmons*, 858 F.2d 137, 142-43 (3d Cir. 1988); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980).

In their appeal, Petitioners made a *prima facie* showing of extra-judicial bias and prejudice on the part of the trial judge, or, at a minimum, an appearance of extra-judicial bias and prejudice, based on the following:

1. remarks made by the trial judge about the ethnic and/or religious background of Petitioner Klayman, Defendants' principals and Defendants' key witness; *see* Appendices E and F;

2. a history of similar conduct by the trial judge in previous cases; *see Borrero-Isaza*, *supra*; *Hobbs*, *supra*; and

3. the trial judge's financial interest in Appellee's parent corporation. *See* Appendix A at App. 7-8.

In light of this uncontroverted showing, it was incumbent upon the Federal Circuit to take appropriate action, including a review of the entire transcript, to pursue this matter to a just

and fair conclusion. Judicial Code of Conduct, Canon 3(B)(3); *see also* ABA Model Code, Canon 3(D)(1). However, the Federal Circuit not only failed to do so, but it also failed to perform any analysis under the Judicial Code of Conduct (or the ABA Model Code) whatsoever -- despite the Panel's having acknowledged at oral argument that the Judicial Code of Conduct is more strenuous than the statutory provisions of 28 U.S.C. § 455; Appendix D at App. 52. Importantly, the Federal Circuit even failed to address "black letter" case law demonstrating that only the appearance of impartiality was necessary for a trial judge to be disqualified under 28 U.S.C. § 455. *Tucker*, 78 F.3d at 1324; *Moody*, 858 F.2d at 142-43; *Potashnick*, 609 F.2d at 1111.

However uncomfortable these issues might have been for fellow judges to confront, due process, the Judicial Code of Conduct, the statute and relevant case law requires not a perfunctory affirmance, but a thorough review of the complete trial transcript and supporting evidence, along with consideration of all relevant legal arguments. The Federal Circuit's failure to perform this analysis raises serious concerns about due process and the administration of the court system, particularly when judicial conduct is at issue. Thus, *certiorari* is, respectfully, necessary to enable this Court to exercise its supervisory powers over the Federal Circuit to preserve the fair administration of justice.

C. Affirmance Without Consideration of the Necessity for Procedural Safeguards.

Before sanctions may be imposed, procedural safeguards must be employed to protect the due process rights of counsel under threat of sanctions -- especially where a judge has

become personally embroiled with counsel during the course of a trial. For example, *In re Yagman*, 796 F.2d 1165 (9th Cir. 1986), a case involving the same lower court judge, the Ninth Circuit held:

> If...the record reflects that the judge imposing the sanction has been the target of the sanctioned attorney's vilification or was otherwise personally embroiled with the attorney during the trial, the suspicion is intensified and the court must carefully assess the circumstances to determine if additional due process safeguards are called into play.

796 F.2d at 1181.[8] In the specific context of *pro hac vice* admissions, the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") has cautioned:

> "If a District Court has evidence of behavior that it believes justifies denying an attorney admission *pro hac vice*, it must set a hearing date and give the attorney adequate notice of all incidents of alleged misbehavior or unethical behavior that will be charged against him. Specific allegations must be made; general accusations about an attorney's demeanor are insufficient. The hearing must be on the record and present the attorney with adequate opportunity to defend himself and his professional reputation. The presiding judge must be sensitive to possible conflicts of interest if events cast him into the roles of witness, prosecutor and judge."

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[8] *See generally Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995), also concerning this same trial judge.

In re Evans, 524 F.2d 1004, 1008 (5th Cir. 1975) (Emphasis added). Similarly, in *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350 (3d Cir. 1990), the U.S. Court of Appeals for the Third ("Third Circuit") stated:

> [W]e think a district court...must identify and determine the legal basis for each sanction charge sought to be imposed, and whether its resolution required further proceedings, including the need for an evidentiary hearing.

899 F.2d at 1359 (Emphasis added).

Because the trial judge's *pro hac vice* order effectively barred Petitioner Klayman from ever appearing before the District Court again, Petitioners correctly argued that he was entitled to a full panoply of procedural safeguards, including ample notice, the right to counsel, and an evidentiary hearing before an impartial judge, among others. *See, e.g.*, Appendix D at App. 36-37. However, the trial judge, with whom Petitioner Klayman had clashed repeatedly during the course of a trial that lasted several weeks, took it upon himself to be "witness, prosecutor and judge" by orally "springing" a sanction order on Petitioner Klayman, *sua sponte*, after issuing his findings on the merits of the case. Thus, Petitioner Klayman was denied the right to meaningful notice of the factual and legal bases of the serious charges against him, the opportunity to research and reflect on these serious charges, the right to counsel, the right to an evidentiary hearing, and the right to an impartial trier of fact.

However, as with Petitioners' arguments concerning the applicability of the Judicial Code of Conduct, the Federal Circuit did not address this very important legal issue in its

decision. Thus, not only were Petitioners denied due process of law in the District Court, but they were also denied due process of law by the Federal Circuit, which failed to fully perform its oversight function by not addressing the important issues before it and by rendering an opinion without having reviewed the entire trial transcript, despite uncategorically admitting that a review of the entire transcript was necessary. Thus, a writ of *certiorari* is required to enable this Court to exercise supervisory powers to ensure that, not just this particular appellate court, but all of the Circuits, are constantly diligent in carrying out their duties, and that all attorney litigants who come before them be afforded full due process of law, and that charges of judicial misconduct are thoroughly and seriously reviewed. In this case, while reflexively criticizing Petitioners for raising issues of extra-judicial bias, the Federal Circuit inexplicably shied away from reviewing the trial transcript to properly consider this bias on appeal. Accordingly, its decision was reached in a self-imposed "factual vacuum."

II. A WRIT OF CERTIORARI IS NECESSARY BECAUSE THE FEDERAL CIRCUIT'S AFFIRMANCE OF THESE SANCTIONS, WITHOUT THE TRIAL COURT'S EXPRESS IDENTIFICATION OF THE SANCTIONING AUTHORITY OR AN EXPRESS FINDING OF BAD FAITH, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

A. The Affirmance of Sanctions Without Reference to the Sanctioning Authority.

In affirming the District Court's *pro hac vice* order, the Federal Circuit issued a decision that is in direct conflict with the decisions of at least three (3) other Circuits. Specifically, because the lower court's *pro hac vice* order was silent as to the authority under which it was entered, the Federal Circuit speculated that the District Court had acted pursuant to its inherent powers: "It may be that Judge Keller intended his further citation to his 'discretion' to mean his inherent powers to impose sanctions when appropriate." *See* Appendix A at App. 21. The Federal Circuit then proceeded to analyze the District Court's *pro hac vice* order as if it had been entered pursuant to its inherent powers.

In contrast to the Federal Circuit's speculation in affirming the District Court's *pro hac vice* order, the U.S. Court of Appeals for the First Circuit ("First Circuit") and the Third Circuit vacated and remanded sanctions orders for failure to specify the legal bases for their imposition. For example, in *Foster v. Mydas Assocs., Inc.*, 943 F.2d 139 (1st Cir. 1991), the First Circuit held: "[A]t a bare minimum, the trial court must indicate, either expressly or by unmistakable implication, which source of authority it is invoking..." *Id.* at 142. Likewise, in *Jones*, *supra*, the Third Circuit vacated and remanded a sanctions order for this same reason:

> "[W]e think a district court in the exercise of its sound discretion must identify and determine the legal basis for each sanction charge sought to be imposed, and whether its resolution required further proceedings, including the need for an evidentiary hearing....The resulting findings must appear with reasonable specificity in terms of the perceived misconduct and the sanctioning authority"

Jones, 899 F.2d at 1359.

Similarly, the U.S. Court of Appeals for the Second Circuit ("Second Circuit") vacated and remanded a trial court's award of attorneys fees that failed to specify whether the award had been entered pursuant to Fed.R.Civ.P. 11 or 28 U.S.C. § 1927. *U.S. v. Int'l Bhd. of Teamsters*, 948 F.2d 1338, 1346 (2d Cir. 1991) ("It is clear therefore, that separate consideration of the available sanctions machinery is not only warranted, but necessary for meaningful review."); *see also In re Yagman*, 796 F.2d at 1183 ("This means foremost that the conduct in question must in fact be sanctionable under the authority relied upon.")

The holdings of the First, Second and Third Circuits present the better reasoned approach. Specifying the legal basis for the imposition of sanctions is not only necessary for meaningful appellate review, *see Int'l Bhd of Teamsters*, 948 F.2d at 1346, but must be required to ensure that the party upon which the sanctions were imposed had adequate notice of the legal basis for the charges against it. Specificity is also necessary to avoid the chilling effect that would likely result from such orders, as surely attorneys will be less likely to represent their clients zealously if they can be sanctioned without reference to any particular legal authority. *In re Yagman*, 796 F.2d at 1183. Thus, a petition for writ of *certiorari* is necessary to settle the conflict created by the Federal Circuit's decision on this important issue of law.

B. The Affirmance of Sanctions Issued Pursuant to a Trial Court's Inherent Authority Without a Finding of Bad Faith.

This Court has cautioned that, because of the "very potency" of a court's inherent power, it should be exercised "with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Thus, several of the Circuits require a highly particularized showing of bad faith before they will affirm sanctions entered pursuant to a trial court's inherent authority.

For example, in *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989), the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit') held:

> Because "inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." To insure that restraint is properly exercised, we have routinely insisted upon a finding of bad faith before sanctions may be imposed under the court's inherent powers. A specific finding of bad faith by the trial judge or magistrate must accompany the sanction order in all such cases.

885 F.2d at 1478, *quoting*, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (Citations omitted).

Likewise, in addressing the use of a court's inherent powers to impose sanctions, the Second Circuit stated in *Int'l Bhd of Teamsters*:

> We have declined to uphold awards under the bad faith exception absent both "'clear evidence' that the challenged actions 'are entirely without color, and [are taken] for reasons of harassment or delay or for other improper

purposes'" and "'a high degree of specificity in the factual findings of [the] lower courts.'"

948 F.2d at 1345, *quoting*, *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

In this case, after first speculating that the District Court had relied on its inherent power in imposing the *pro hac vice* sanction, the Federal Circuit then affirmed the order by inferring a finding of bad faith: "Although the words 'bad faith' are not recited in the order, the order makes clear that the trial judge considered Mr. Klayman to have acted in bad faith..." Appendix A at App. 22. Resorting to such an inference, rather than requiring a specific finding of bad faith, is thus in direct conflict with the decisions of the Ninth and Second Circuits, which require highly particularized findings of bad faith before affirming a sanction order entered pursuant to a trial court's inherent authority.

In light of this Court's own admonitions on the need for courts to use restraint and discretion in exercising their inherent powers, *Chambers*, 501 U.S. at 44; *Roadway Express*, 447 U.S. at 764, the better reasoned approach is that of the Ninth and Second Circuits, as only with a particularized finding of bad faith can a reviewing court ensure that proper restraint has been used in the exercise of a court's inherent authority. Thus, a writ of *certiorari* is necessary to resolve the conflict among the Circuits created by the Federal Circuit's opinion on this important issue of law.

C. Affirmance of Sanctions Issued Pursuant to 28 U.S.C. § 1927 Without a Finding of Bad Faith.

Finally, the Federal Circuit's decision is also in conflict with decisions of the Second and Third Circuits insofar as it affirmed an award of sanctions imposed pursuant to 28 U.S.C. § 1927 by applying a lesser, "objective" standard of recklessness, rather than a stricter, "subjective" standard of bad faith. Moreover, the Federal Circuit affirmed this award despite the District Court's failure to make even an express finding of recklessness. Specifically, the Federal Circuit stated:

> "In this case, although Judge Keller did not employ the words 'bad faith,' our review of the record leaves no doubt that he considered K&A's conduct with regard to the proceedings for which sanctions were imposed to be at least reckless."

Appendix A at App. 20 (Emphasis added).

This holding is in direct conflict with authority from the Second Circuit, demonstrated by that court's decision in *Int'l Bhd. of Teamsters*, requiring an express finding of bad faith to impose sanctions pursuant to 28 U.S.C. § 1927. Specifically, in *Int'l Bhd. Of Teamsters*, the Second Circuit declared: "Bad faith is the touchstone of an award under this statute," 948 F.2d at 1345, and "[b]oth §1927 and the court's inherent power demand, *inter alia*, a clear demonstration of bad faith in order to justify sanctions." 948 F.2d at 1347.

Likewise, the Third Circuit also has adopted this stricter standard. "Section 1927 requires a finding of counsel's bad faith as a precondition for the imposition of fees." *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir. 1987); *see also Martin v. Brown*, 63 F.3d 1252, 1264 (3d Cir. 1995) ("We

note, however, that section 1927, unlike Rule 11, requires bad faith").

The holdings from the Second and Third Circuits present the better reasoned approach because, as with the need for a District Court to specify the legal authority under which sanctions are imposed, a subjective standard of bad faith avoids any chilling effect on vigorous advocacy that might otherwise occur. Attorneys will be less likely to represent their clients to the fullest extent if, in retrospect, zealous, but good faith conduct may later be characterized by a skillful opponent or court as sanctionable, reckless conduct. This is especially true in a legal environment in which litigants increasingly attempt to use sanctions to secure tactical advantages. Thus, a writ of *certiorari* is necessary to settle the conflict among the Circuits on this important issue of law as well.

CONCLUSION

Petitioners are mindful that, in order to preserve the integrity of and confidence in the judicial system, attorney sanctions must be meted out in appropriate circumstances. However, to avoid a chilling effect on zealous advocacy (*see Model Code of Professional Responsibility*, Canon 7), due process requires that adequate procedural safeguards be employed to determine when sanctions are appropriate and to ensure that they are imposed fairly when those circumstances arise, especially where a trial judge has acted as witness, prosecutor and judge. To this end, an impartial court imposing the sanctions must, at a minimum, specify the legal basis for its action and make appropriate factual findings, including an express finding of bad faith, when sanctions are

to be imposed pursuant to a court's inherent power or 28 U.S.C. § 1927. Moreover, due process requires that attorney litigants upon whom sanctions are imposed must be afforded meaningful appellate review -- not blind, perfunctory affirmances -- even when they raise difficult and uncomfortable issues concerning the professional conduct of fellow judges. Because the sanctions in this particular case were imposed, and upheld, without due process and appropriate procedural safeguards, the petition for writ of *certiorari* should, respectfully, be granted to avoid creating a dangerous precedent that would chill zealous advocacy by trial counsel on behalf of their clients. This is required to preserve the integrity of and confidence in the legal system, for not only attorneys and judges, but also the public at large, as:

> Justice should not only be done, but should manifestly be seen to be done."

Lord Hewart, *King's Bench Reports*, Vol. 1 (1924) (Emphasis added).

Respectfully submitted,

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APPENDIX A - MARCH 4, 1996 APPELLATE COURT OPINION

THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1185, -1186

BALDWIN HARDWARE CORPORATION,
Plaintiff/Cross-Appellant,

v.

FRANKSU ENTERPRISE CORPORATION, FRANK SU and DECORATORS ACCESSORIES, LTD.,

Defendants-Appellants,

and

KLAYMAN & ASSOCIATES, P.C., and LARRY KLAYMAN,

Appellants.

DECIDED: March 4, 1996

Before NEWMAN, PLAGER, and RADER, Circuit Judges.

PLAGER, Circuit Judge.

Klayman & Associates, P.C., a law firm ("K&A"), challenges sanctions imposed on the firm by the trial court for failure to comply with local rules and for "unreasonably and

vexatiously multiplying the proceedings," during K&A's defense in design patent and trademark infringement litigation brought by Baldwin Hardware Corporation ("Baldwin") against FrankSu Enterprise Corporation, Mr. Frank Su, and Decorator Accessories Ltd. ("Decorax"), Larry Klayman, K&A's lead counsel in this litigation, appeals from the trial court's order permanently prohibiting Mr. Klayman from appearing *pro hac vice* before the trial judge, William D. Keller, in any future litigation. K&A and Mr. Klayman (collectively "Appellants") argue that the orders are invalid because the trial judge failed to recuse himself from the case despite a financial conflict of interest and apparent bias against appellants and their clients; and that in any event, counsel's conduct did not merit sanctions. Baldwin, which secured a finding of willful infringement below, cross-appeals, seeking full attorney fees for that action and costs and attorney fees for this appeal, which it contends is frivolous.[1] After careful consideration of the record and materials submitted by the parties, we affirm the trial court's award of monetary sanctions against appellants, deny further attorney fees to Baldwin, and award Baldwin costs for this appeal. We also affirm Judge Keller's order permanently prohibiting Mr. Klayman from appearing before him *pro hac vice* in the future.

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[1] FrankSu Enterprise Corporation, Frank Su and Decorax also appealed initially. This court dismissed that appeal on November 12, 1993, however, because they had released K&A as their counsel and did not acquire new counsel or, in the case of Mr. Frank Su, apply to appeal *pro se*. See Fed. Cir. R. 47.3(a).

BACKGROUND

This regrettable appeal has its origins in design patent and trademark infringement litigation brought by Baldwin, an American manufacturer of bathroom and door hardware, against FrankSu Enterprise Corporation, a Taiwanese competitor, along with Mr. Frank Su, Franksu's owner and Decorators Accessories, Ltd., a Franksu distributor. Judge William D. Keller of the Central District of California presided over a seven-week trial and the motions practice preceding trial.

Pretrial proceedings, particularly discovery proceedings, in this matter were marked by appellants' delays in complying, or failure to comply, with the court's rules and orders. On December 9, 1991, Judge Keller assessed against K&A attorney fees and costs incurred by Baldwin in responding to appellants' *ex parte* application for an extension of time to oppose Baldwin's summary judgment motion, and for a continuance of the hearing date on the motion. Judge Keller found that K&A filed its application for an extension three days after the opposition due date, and that the only proffered reasons for lateness, extensive business travel and the errors of an associate at the firm, were insufficient.

Early in the trial, conducted in 1992, reference was made to Baldwin's parent company, Masco. The next day Judge Keller informed the parties that at the time Baldwin filed its complaint in September 1990, the judge's mother had owned shares in Masco as part of a trust fund naming Judge Keller as the beneficiary. The trust sold the shares in November 1990, before the judge had become involved in any way in the case. Because the shares had been sold well before Judge Keller became involved in the case or knew that Masco was related

to one of the parties before him, and given the amount of time he had spent on the case to date, the judge concluded that he was not required to recuse himself. Both parties expressly agreed with this conclusion.

During the course of the trial, however, appellants requested that Judge Keller recuse himself under 28 U.S.C. § 455 (1994).[2] Appellants cited the following grounds for the motion: (1) that Judge Keller had "prejudged" the case; and (2) that Judge Keller "at some point in [the] case" had a prospective financial interest in Baldwin's parent company, Masco. Judge Keller denied the motion after addressing each of the instances of alleged prejudgement raised by appellants. He also addressed the Masco issue for a second time and concluded that the circumstances did not warrant recusal.

Over the course of the trial, Judge Keller admonished Mr. Klayman several times concerning his conduct of the proceedings: for example, failing to provide advanced written notice of the prior art appellants intended to use during trial, as required by 35 U.S.C. § 282; failing to have Mr. Frank Su appear in court on the appointed day after the trial court had granted an extension of time to allow for Mr. Su's travel from Taiwan and preparation by counsel; and lodging a late request for a jury trial on the patent issues in the case after admittedly waiving a jury trial for such issues at a pretrial status conference. Additionally, Judge Keller expressed increasing frustration with Mr. Klayman's practice of continuing to speak after the trial judge requested silence.

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[2] Unless otherwise indicated, all citations are to the 1994 edition of the United States Code.

Following the close of trial, Judge Keller *sue sponte* ordered Mr. Klayman permanently and prospectively barred from appearing before Judge Keller *pro hac vice* in any future litigation. Judge Keller cited several actions by Mr. Klayman during the trial as grounds for the order. Additionally, Judge Keller sanctioned K&A under 28 U.S.C. § 1927 for "unreasonably and vexatiously multiplying the proceedings" and awarded Baldwin attorney fees and expenses incurred with respect to various aspects of the trial. Judge Keller incorporated the sanctions orders into his final judgment in the case.

Appellants appeal the monetary sanctions and *pro hac vice* order. Baldwin cross-appeals for full attorney fees and costs incurred in the proceedings below and in this appeal.

DISCUSSION

We have jurisdiction over this matter under 28 U.S.C. § 1295(a)(1), which provides for exclusive Federal Circuit jurisdiction over "an appeal from a final decision of a district court . . . if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title [providing district courts original exclusive jurisdiction in patent cases, and original jurisdiction in trademark cases]".

I

Appellants argue first that the sanctions orders and the *pro hac vice* order are invalid because they were entered by a judge who was required to recuse himself under 28 U.S.C. § 455, which provides in pertinent part:

> (a) Any . . . . judge . . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party . . . . (4) He knows that he, individually or as a fiduciary . . . . has a financial interest in the subject matter in controversy or in a party to the proceeding . . . .

28 U.S.C. § 455(a), (b)(1), (b)(4). Specifically, appellants argue that Judge Keller was required to recuse himself under § 455(a) and (b)(1) because his comments and conduct during the litigation would have led a reasonable person to believe he harbored anti-Asian and anti-semitic sentiments, and therefore to doubt his impartiality.[3] Appellants also argue that the prior ownership of Masco shares by Judge Keller's mother's trust created a financial conflict of interest requiring recusal under § 455(b)(4). Because Judge Keller did not recuse himself, appellants contend, any subsequent orders issued by him, including the sanctions orders and the judgment against appellants' clients, are invalid.

In reviewing Judge Keller's denial of recusal, which raises substantive and procedural issues not within our exclusive jurisdiction, we are guided by the law of the regional circuit. See *Refac Int'l, Ltd. v. Hitachi Ltd.*, 921 F.2d 1247, 1253-54, 16 USPQ2d 1347,1352 (Fed. Cir.1990) (sanctions under Rule 37 and Rule 11 reviewed under Ninth Circuit law); *Atasi*

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[3] Clients Frank Su and Franksu Enterprise Corp. are Taiwanese. The president of Decorax, a key defense witness, is Jewish, as is Mr. Klayman.

Corp. v. Seagate Technology, 847 F.2d 826, 829, 6 USPQ2d 1955, 1956 (Fed. Cir. 1988) (disqualification of law firm reviewed under regional law). Under Ninth Circuit law, the standard for review of Judge Keller's refusal to recuse himself is abuse of discretion. *United States v. Chischilly*, 30 F.3d 1144, 1149-50 (9th Cir. 1994).

A. Recusal for financial conflict of interest

We first address this matter of financial conflict of interest. We agree with Baldwin that appellants' assertion of a financial conflict of interest in this matter borders on the frivolous. Appellants' brief utterly omits any discussion of the key facts and key legal provision concerning this issue. The record establishes that Judge Keller's mother owned a trust which invested in several stocks, among them shares of Masco, the parent company of Baldwin. Judge Keller was the named beneficiary of the trust and thus owned a remainderman interest in the shares. The trust sold the shares in November 1990, two months after Baldwin filed its patent action. Judge Keller did not issue his first substantive order in this case until the end of December 1990. He did not learn of the relationship between Masco and Baldwin until after trial had begun, roughly eighteen months later. When he did, he disclosed to the parties his former remainderman interest in Masco shares, expressed his opinion that the trust's divestiture of the shares well before he became substantively involved in the case or knew of the Masco-Baldwin relationship eliminated any need for recusal, and invited the parties to raise any conflict of interest concerns with him at that point. Notably, Mr. Klayman stated that he did not "wish to make a point of it." Regardless of whether, as Mr. Klayman later pointed out to Judge Keller, § 455(e) prevents waiver by a

party of financial conflicts, Mr. Klayman's statement indicates that he initially did not consider recusal to be required.

Under these facts, Judge Keller clearly was not required to recuse himself. Section 455(f), also omitted from appellants' brief, provides:

> Notwithstanding the preceding provisions of this section, if any . . . judge . . . to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary . . . has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the . . . judge . . . divests himself or herself of the interest that provides the grounds for the disqualification.

28 U.S.C. § 455(f). This provision squarely fits the present circumstances. It suggests, in fact, that even if the Masco shares had remained in the trust until Judge Keller discovered the Masco-Baldwin relationship, divestiture by the trust at that point (or relinquishment by Judge Keller of his remainderman interest in those shares) would have avoided the need for disqualification. Appellants' utter failure to address this provision, or the relevant facts on this issue, is inexplicable. In any event, assuming that the trust's ownership of the Masco shares raised a financial conflict under § 455(b), the November 1990 divestiture of those shares eliminated any such conflict and any possible need for recusal on that basis.

B. Recusal for alleged antisemitism and anti-Asian bias

We turn next to appellants' claim that Judge Keller exhibited antisemitism and anti-Asian bias against appellants and their clients, and therefore was required to recuse himself under §§ 455(a) and (b)(1). "Sections 455(a) and (b)(1) are to be construed together when the ground for recusal is the bias or partiality of the trial judge." *United States v. Winston*, 613 F.2d 221, 223 (9th Cir. 1980) (citing *United States v. Olander*, 584 F.2d 876, 882 (9th Cir.1978)). Under those provisions, "the trial judge is required to recuse himself only when a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. *Winston*, 613 F.2d at 223.

This determination, in the first instance, "rests within the sound discretion of the [trial] judge." *United States v. Sibla*, 624 F.2d 864, 868 (9th Cir.1980) (citation omitted). Appellants never directly presented the issue of ethnic or racial bias to Judge Keller as a ground for recusing himself, nor did they afford Judge Keller an opportunity to address this issue.[4] Under the circumstances, we question whether the matter is

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[4] There was one indirect reference to ethnic bias in a comment that Mr. Klayman made to Judge Keller in listing the grounds for his recusal motion. Mr. Klayman asserted that Judge Keller "raised the issue that you treat everybody the same regardless of national origin. Your Honor, that was a non sequitur in that context." Mr. Klayman's other assertions of bias with respect to the way Judge Keller evaluated the credibility of witnesses or criticized appellants' performance contained no direct reference to ethnic or religious bias on the part of Judge Keller.

properly before us on appeal, and "even assuming that [appellants] may raise [a] section 455 recusal claim for the first time on appeal . . . we would review the district court's failure to recuse himself under the plain error standard." *United States v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991). In the interest of ensuring that justice not only is impartial but appears so, we have reviewed the record to determine in the first instance whether it would have constituted plain error for Judge Keller to have refused recusal under § 455(a) and (b)(1).

The Supreme Court recently elaborated on the type of judicial conduct, and the underlying reasons for that conduct, that warrant recusal for bias:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile, to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge . . . . Not establishing bias or partiality . . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration -- even a stern and short-tempered judge's ordinary efforts at courtroom administration -- remain immune.

Liteky v. United States, 114 S. Ct.1147,1157 (1994). We have thoroughly reviewed the record before us and devoted much consideration and reflection to the parties' contentions. We conclude that appellants have not carried the heavy burden necessary to substantiate their recusal claim under *Liteky*. While Judge Keller was stern (with counsel for both sides, not just appellants) and imposed less restraint on his comments and criticism than may be desired, we cannot say that his conduct of the proceedings evinced a "deep-seated favoritism or antagonism [toward Asians or Jews] that would make fair judgment impossible." *Liteky*, 114 S. Ct. at 1157. Our overall impression from the record and pleadings in this appeal is that Judge Keller grew increasingly impatient with what he considered to be incompetence or lack of forthrightness and that he conducts his courtroom with strict enforcement of the rules.

To warrant recusal, bias or prejudice must be directed against a party and bias exhibited against an attorney will only merit recusal when it results in material and identifiable harm to that party's case. See *United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985); *Cintron v. Union Pacific R.R.*, 813 F.2d 917, 921 (9th Cir. 1987). In this case, the record indicates that Judge Keller did not permit his frustration with appellants to interfere with a full trial of their clients' claims and defenses. For example, although sanctioning counsel for delaying the trial in part due to Mr. Frank Su's nonappearance on the scheduled date, the trial judge allowed appellants additional time to prepare Mr. Su and permitted the parties to rearrange the order of witnesses to ensure sufficient preparation time. Moreover, while sanctioning appellants for failing to comply with § 282, Judge Keller nonetheless allowed in much of the prior art of which appellants had failed to notify Baldwin.

The trial judge ruled partly in favor of appellants' clients. He found that some of FrankSu's products did not misappropriate Baldwin's trade dress rights, and that some Baldwin products had no protectable trade dress rights. Further, although the trial judge found that FrankSu willfully infringed and misappropriated Baldwin's trade dress, he doubled rather than trebled damages. The trial judge did not award full attorney fees to Baldwin, and stayed execution of the attorney fee sanctions against appellants pending appellate review. Baldwin asserts, and appellants do not dispute, that the trial judge withdrew documents relating to settlement negotiations from evidence in which Mr. Frank Su admitted copying and infringement of Baldwin's designs, despite appellants' failure to object to them. In these circumstances, we find no material and identifiable harm to appellants' clients from any reprimand of appellants by the trial judge.

It should be noted, moreover, that appellants rejected an opportunity to have a magistrate judge rather than Judge Keller try the case below. This opportunity came during appellants' belated request for a jury trial on Baldwin's patent claims, which appellants claim they made after they purportedly recognized Judge Keller's alleged bias against appellants and their clients. During the colloquy between appellants and the trial judge concerning the jury trial request, appellants stated that they wanted Judge Keller to preside rather than a magistrate because they "liked" him and felt he had "a good sense of humor. That's important." Despite the trial court's urging, appellants refused to accept a magistrate to preside over the trial. In these circumstances, it ill becomes appellants to assert that Judge Keller's later refusal to recuse himself nullifies all proceedings below.

Appellants have moved us to order a complete trial transcript, which they contend is needed to fully inform this court of the bias that allegedly infected the proceedings below. Although ordinarily it is appellants' responsibility to obtain those portions of the record it requires to support its case, Fed. Cir. R. 10(a)(1), (2), (4), appellants assert that financial distress, occasioned in part by the monetary sanctions and FrankSu's failure to pay appellants' fees, prevents them from purchasing the transcript.[5] Appellants previously applied to the district court, either on their clients' behalf or their own, four times for a reduced transcript fee. The district court denied these requests, finding that the corporate entities were not eligible to proceed *in forma pauperis* under *Rowland v. California Men's Colony*, 113 S. Ct. 716, 719 (1993), and that neither appellants nor their clients had provided sufficient objective evidence of distress to establish "exceptional circumstances" warranting in forma pauperis treatment under 28 U.S.C. § 1915.[6]

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[5] The district court has informed this court that there is no transcription of the trial tapes at the district court; therefore appellants would be required to purchase a copy from the court reporter, as did Baldwin. Despite this court's urging, the parties did not reach a cost-sharing arrangement regarding those portions of the trial transcript in Baldwin's possession.

[6] See *Weller v. Dickinson*, 314 F.2d 598, 600 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963). The district court also found that corporations FrankSu and Decorax were not qualified to proceed *in forma pauperis* under 28 U.S.C. § 1915. *Rowland v. California Men's Colony*, 113 S. Ct. 716, 719 (1993).

Rather than directly appeal the district court's rulings, appellants instead applied to this court to "compel access to" the transcript and to include it in the Appendix on appeal. After this court twice instructed appellants that "this court will not become involved in the matter of the cost of the transcript of district court proceedings," a motions panel denied appellants' application for access, commenting that the merits panel may revisit the issue. Appellants filed a pending "Renewed Motion for Access to the Trial Transcript and to Supplement the Record to the Merits Panel," purportedly pursuant to this statement.

As the trial judge stated in his orders denying appellants relief on this issue, appellants may seek payment of transcript fees by the United States only when specifically authorized by statute. The statutory authority for such relief is 28 U.S.C. § 1915 ("Proceedings in forma pauperis"), which gives the federal courts discretion to direct payment by the United States of the expenses of printing the record on appeal, if such printing is required by the appellate court. See 28 U.S.C. § 1915(b).[7] Under *Rowland*, K&A, a professional corporation,

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[7] Contrary to appellants' assertion in an earlier version of their "Motion for Access," Federal Circuit Rule 11 (a) does not authorize this court to order transcription of the trial tapes at the expense of the federal government when Appellants have made no showing that they are entitled to such relief under 28 U.S.C. § 1915. Rule 11 (a) only authorizes the court to order transmission of the existing record; in this case, no record in the form of a complete trial transcript exists to be transmitted. Federal Rule of Appellate Procedure 10(e) is similarly unavailing. We note that appellants did not attempt to avail themselves of Federal Rule of Appellate Procedure 10(c), which allows a party, when a transcript is unavailable,

clearly is not entitled to proceed *in forma pauperis*. Individuals such as Mr. Klayman must substantiate their claims of financial distress to obtain *in forma pauperis* treatment. Mr. Klayman has not done so. As with his previous motions before the district court and this court, his latest submission provides no objective supporting data to support their claims of financial distress or justify this court's taxing the Federal Government with the considerable estimated bill for a complete transcript.[8] A previous "Motion for Access" cites to "[f]inancial information filed under seal" that supports his claims, yet he made no effort to place this information before this court, under seal or otherwise. Also in support of the financial distress claim, the motion appends an exhibit that consists of a blank page with the bracketed statement, "[Contains financial information which has been deleted]." It need hardly be said that this is insufficient. Accordingly, we deny appellants' Renewed Motion for Access to the Transcript.

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to "prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." Fed. R. App. P. 10(c). The statement must be served on the appellee, who may object, and the statement and any objections are submitted to the district court for settlement and approval and inclusion in the record on appeal. *Id.*

[8] Baldwin offered to provide the court with a copy of the portion of the transcript they obtained below, which comprises roughly 60 percent of proceedings. In light of appellants' contention in prior motions that review of the entire transcript is necessary to adequately evaluate their claims, and that use of only Baldwin's submissions is inadequate, we decline Baldwin's offer.

In the absence of a complete trial transcript, appellants have sought to build their bias case largely on sources entirely unrelated to the proceedings below -- in particular, Judge Keller's involvement in the sanctioning of Steven Yagman, a Jewish attorney in California, and the local bar's general assessment of Judge Keller's skill and competence on the bench. Such sources are not relevant to the issue of whether Judge Keller exhibited bias or prejudice against appellants' clients warranting recusal in this case.[9]

Appellants also have appended to their pending motion for access to the transcript the affidavits of Messrs. Richard Carter and Steven Goldstein, who served as witnesses during the trial (Mr. Carter also was President of Decorax, which as noted was a defendant below). The affidavits were executed roughly two years after trial and assert, often in generalized terms, that Judge Keller exhibited bias and behaved improperly throughout the trial. Although Baldwin urges us to reject these affidavits, this court already accepted them as attachments to appellants' August 8, 1994 Response to Baldwin's Motion for Leave to File a Supplement to its Initial Brief. Our review of them in the context of deciding the transcript and bias issues indicates no basis for concluding differently than indicated above.

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[9] If anything, the bar evaluations provided by Appellant suggest that the sanctions in this case may have resulted from Judge Keller's practice of strict enforcement of local rules, not ethnic bias against these particular appellants or their clients. *E.g.*, Almanac of the Federal Judiciary, Vol. 1 (1991-1), at 48 (quoting attorney's comment that one should "[f]ollow local rules precisely or be sanctioned. ").

C. Abuse of discretion -- Sanctions

We next turn to appellants' challenges to the monetary and *pro hac vice* sanctions imposed upon them, reviewing each of the three orders in turn. As with recusal, the imposition of monetary and *pro hac vice* sanctions in this case raises issues not within our exclusive jurisdiction. We therefore are guided by the law of the Ninth Circuit.

1. December 9, 1991 Order

Judge Keller found that K&A had failed to comply with Local Rule 27.1 in filing an *ex parte* application for an extension of time to oppose Baldwin's summary judgment motion, three days after the opposition deadline had run. Judge Keller granted an extension to K&A, but assessed against K&A attorney fees and costs incurred by Baldwin in responding to the *ex parte* application. As noted above, Judge Keller stayed execution of the fee award pending review by this court.

Local Rule 27.1 provides that "[t]he violation of or failure to conform to any of these Local Rules . . . shall subject the offending party or counsel to such penalties, including monetary sanctions and/or the imposition of costs and attorney's fees to opposing counsel, as the Court may deem appropriate under the circumstances. " C. D. Cal. Local R. 27.1. K&A does not dispute that it missed the filing deadline for its opposition, or that it filed the application for extension three days after the filing deadline expired. Nor does it mention that it sought an additional 28 days, rather than the usual 14, and asked, without offering any justification, that Baldwin's reply period be shortened from 7 days to 3. K&A attributes the untimeliness to the error of an associate in the

firm, and argues that because it did not act in bad faith, the trial court erred in imposing sanctions.

The decision to impose sanctions under Local Rule 27.1 is reviewed for abuse of discretion; underlying fact findings are reviewed for clear error. Attorneys fees may only be assessed for a violation of Local Rule 27.1 when the attorney acts in bad faith or willfully disobeys court orders or rules. *Zambrano v. Tafolla*, 885 F.2d 1473 (9th Cir. 1989) (mere negligence in failing to become admitted to bar of federal district court did not support attorney fees award). In *Zambrano*, the court stated that "lawyers who willfully, repeatedly, or recklessly disregard court rules or orders may be sanctioned." Id. at 1485.

Judge Keller's order finds that appellants' only excuse for missing the filing deadline was that they were involved in extensive business travel. The order clearly demonstrates that Judge Keller considered appellants to have acted recklessly in disregarding or not paying closer attention to the filing deadlines imposed by the court's rules. We note that Judge Keller did grant appellants 13 extra days in which to file their opposition to Baldwin's summary judgment motion, thereby avoiding any prejudice to their clients from appellants' delay. Under these circumstances, Judge Keller did not err or abuse his discretion in issuing the December 9, 1991 sanctions order. We also reject appellants' request that we remand for recalculation of the amount of the sanctions, finding no error in the trial court's acceptance of the 7.75 hours of preparation time submitted by Baldwin.

2. August 25, 1992 Order

Judge Keller also assessed against K&A, under 28 U.S.C. § 1927, Baldwin's fees and costs incurred with respect to (1) a one-day delay in commencement of trial caused by appellants; (2) Baldwin's opposing Mr. Frank Su's unsuccessful motion to dismiss based on lack of personal jurisdiction; (3) Baldwin's Motion in Limine to exclude prior art for which K&A had not provided notice as required under 35 U.S.C. § 282; (4) trial time spent on addressing the Sepco exhibits, which appellants attempted to introduce as "later discovered" prior art despite contradictory testimony from appellants' own witness; and (5) Baldwin's Motion for Sanctions under § 1927. Section 1927 provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

K&A argues that Judge Keller abused his discretion by imposing these sanctions without finding subjective bad faith on the part of K&A. K&A also argues that fees for a section 1927 application are not themselves available under that provision.

We review all aspects of a sanctions award under section 1927 for abuse of discretion. *MGIC Indemnity Corp. v. Moore*, 952 F.2d 1120, 1121-22 (9th Cir. 1991). Although a finding of bad faith is required to impose sanctions under § 1927, "[k]nowing or reckless conduct meets this standard," and the lack of an explicit finding of bad faith by the trial judge will not preclude sanctions when the record supports such a finding. *Id.* at 1122 (citations omitted); see also *Kanarek v. Hatch*, 827 F.2d 1389,1391 (9th Cir.1987); *Toombs v. Leone*,

777 F.2d 465, 471 (9th Cir. 1985); *Optyl Eyewear Fashion Int'l Corp. v. Style Cos.*, 760 F.2d 1045, 1048, 1051 (9th Cir. 1985).

In this case, although Judge Keller did not employ the words "bad faith," our review of the record leaves no doubt that he considered K&A's conduct with regard to the proceedings for which sanctions were imposed to be at least reckless. We have carefully considered appellants' arguments to the contrary, but conclude that the record supports Judge Keller's assessment of appellants' conduct. Accordingly, we find that he did not err or abuse his discretion in awarding sanctions against appellants. In addition, we reject appellants' contention, included in certain "transcript access" motions filed with this court but not advanced in their brief on appeal, that appellants were not given adequate opportunity to address the issues identified in the sanctions order; the record indicates that these issues were fully aired below.

We also reject appellants' argument that "fees for fees" are not available under section 1927. We have found no authority for such a proposition, and appellants cite none. The statute allows recovery of excess fees incurred as a result of opposing counsel's conduct, and "fees for fees" clearly fall within this description.

3. June 30, 1992 Pro Hac Vice Order

At the close of trial, Judge Keller *sue sponte* indicated that he intended to issue an order permanently and prospectively barring Mr. Klayman from appearing before him *pro hac vice* and requiring him to attach a copy of the order to any future *pro hac vice* applications in the Central District of California. Judge Keller cited the conduct that he felt

supported this sanction and allowed Mr. Klayman to respond and to explain or address the conduct cited. After listening to Mr. Klayman's response and following the close of trial, Judge Keller issued the above described order.

Mr. Klayman contends, first, that this order has no basis in law. "For a sanction to be validly imposed, the conduct in question must in fact be sanctionable under the authority relied upon." *In re Yagman*, 796 F.2d 1165, 1182-83 (9th Cir. 1986). In issuing the above order Judge Keller cited the *pro hac vice* rules, which gives the trial judge discretion to grant or deny *pro hac vice* status. Central District of California Local Rule 2.2.3.1 provides:

> 2.2.3.1 Permission Pro Hac Vice. Any person who is not otherwise eligible for admission to practice before this Court, but who is a member in good standing of, and eligible to practice before, the bar of any United States Court, or of the highest court of any State, Territory or Insular Possession of the United States, who is of good moral character, and who has been retained to appear before this Court, may, upon written application and in the discretion of the Court, be permitted to appear and participate pro hac vice in a particular case.

(emphasis added).

It is not clear that this rule authorizes Judge Keller's order; the rule appears to address determinations of admission *pro hac vice* in each individual case. It may be that Judge Keller intended his further citation to his "discretion" to mean his inherent powers to impose sanctions when appropriate. "Any court which has the power to admit attorneys to practice may

also sanction them for unprofessional conduct." *Standing Committee on Discipline v. Ross*, 735 F.2d 1168,1170 (9th Cir.1984); see also *Yagman v. Republic Insurance Co.*, 987 F.2d 622, 628 (9th Cir. 1993). That power encompasses the authority to suspend an attorney admitted *pro hac vice* from further practice before the court. *United States v. Engstrom*, 16 F.3d 1006 (9th Cir. 1994) (upholding order suspending attorney admitted *pro hac vice* from practice before the court for three years).

We review the terms of a disciplinary order entered under the court's inherent authority for abuse of discretion. *Engstrom*, 16 F.2d at 1011; *Yagman*, 987 F.2d at 628. A court imposing sanctions under its inherent powers must determine that the attorney acted in bad faith. *Yagman*, 987 F.2d at 628. Mr. Klayman contends that Judge Keller abused his discretion by permanently denying *pro hac vice* status without finding that Mr. Klayman acted unethically or in bad faith. Although the words "bad faith" are not recited in the order, the order makes clear that the trial judge considered Mr. Klayman to have acted in bad faith, in particular by making certain misrepresentations to the court. For example, Judge Keller found that Mr. Klayman represented to the court that he had never been sanctioned or denied *pro hac vice* privileges, when in fact his former firm, Klayman & Gurley, P.C., had been sanctioned in a matter handled by Mr. Klayman and two other attorneys of the firm. Mr. Klayman's explanation of his failure to mention the prior sanctions to Judge Keller -- that he did not understand the judge's question to cover those sanctions since they were imposed on the firm and not him personally -- is unconvincing. That the order was being appealed at the time of Judge Keller's inquiry, or that the order was subsequently vacated at the request of both parties in order to further settlement of the dispute, is irrelevant.

We have carefully considered appellants' explanations for the other misconduct cited by the trial judge, and likewise find them insufficient to establish an abuse of discretion in imposing this sanction. With respect to the requirement that Mr. Klayman submit a copy of Judge Keller's order with any future application for admission *pro hac vice* to the Central District of California, we note that Local Rule 2.3.2 itself requires that "each applicant for permission to appear pro hac vice shall present to the Clerk a written petition containing . . . (d) whether the applicant has been subjected to any discipline by any court or administrative body . . . (e) whether in the 3 years preceding the application the applicant has applied for permission to practice pro hac vice before any court within the State of California, together with the . . . disposition of each such application." Local Rule 2.3.2(d), (e).

We also reject appellants' contention, included in their motions concerning access to the transcript but not advanced in their brief on appeal, that this sanction was issued without due process. The record indicates that the items cited in the order were addressed by the trial judge and the parties as they arose during the trial; Mr. Klayman therefore had notice of the court's displeasure and an opportunity to respond both during the trial and, at length, after Judge Keller proposed the sanctions. *Cf. Engstrom*, 16 F.3d at 1012; *Leis v. Flynt*, 439 U.S. 438, 442-43 (1979).

D. Baldwin's Cross-Appeal for Full Attorney Fees and Costs under 35 U.S.C. § 285 and 15 U.S.C. § 1117(a)

Baldwin argues that cumulative misconduct by appellants, coupled with the district court's finding of willful infringement and FrankSu's failure to obtain advice of counsel

on whether Baldwin's patents were valid (a defense raised by FrankSu at trial), warranted a finding of "exceptional circumstances" under § 1117 of the Lanham Act and § 285 of the Patent Statute.[10] Baldwin asserts that the district court erred in not making such a finding and not awarding Baldwin full attorney fees for the proceedings below.

We apply the law of this circuit in reviewing the court's denial of fees under § 285. Whether exceptional circumstances exist under § 285 is a fact issue which we review for clear error. *Morton Int'l, Inc. v. Cardinal Chemical Co.*, 5 F.3d 1464, 1470, 28 USPQ2d 1190, 1195 (Fed. Cir. 1993). We find no clear error in the trial court's conclusion that exceptional circumstances did not exist in this case. Although the trial court found willful infringement, which we have held may suffice to find a case exceptional, *L.A. Gear, Inc. v. Tom McCan Shoe Co.*, 988 F.2d 1117, 25 USPQ2d 1913 (Fed. Cir.), *cert. denied*, 114 S. Ct. 291 (1993), the court also found that Mr. Frank Su did not know that trade dress is a protectable property right, and that Baldwin's patents and trade dress rights were not strong.

We also conclude that Judge Keller did not abuse his discretion in finding, based on his consideration of all of the circumstances of the case before him, that the case was not "exceptional" under § 1117(a) of the Lanham Act, an issue

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[10] Section 1117(a) of the Lanham Act provides that a "court in exceptional cases may award reasonable attorney fees to the prevailing party" who has established a violation of the rights of a trademark registrant. 15 U.S.C. § 1117(a). Section 285 of the Patent Statute contains identical language authorizing an award to the prevailing party in a patent suit. 35 U.S.C. § 285.

that we review with guidance from Ninth Circuit law. See *Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1133 (9th Cir. 1986) (court did not abuse its discretion in denying fees under § 1117(a) even though defendants knew goods they sold were not genuine Polo).

E. Whether the District Court Abused its Discretion in Not Granting Baldwin Full Attorney Fees under 28 U.S.C. § 1927

Baldwin argues that the trial judge abused his discretion in not awarding Baldwin full attorney fees under section 1927 based on appellants' "pervasive vexatious conduct." The trial judge acknowledged that full attorney fees "could very well warrant extremely significant award of attorneys [sic] fees" but decided to award only fees for individual instances of vexatious conduct that multiplied the proceedings. The trial judge's determination not to award full fees to Baldwin was based on a thorough appreciation of appellants' conduct and its effect on the proceedings below, and we will not disturb that determination here.

F. Baldwin's Request for Fees and Costs under Fed. R. App. P. 38

Baldwin also seeks full fees and costs incurred in defending against this appeal and in responding to appellants' numerous and often improper filings in this court. We wish to make absolutely clear that appellants' conduct falls far short of the standards we expect from counsel appearing before us. Throughout this appeal, appellants have taken considerable liberties with the record and mischaracterized statements therein; peppered the court with motions seeking a free transcript that do not acknowledge or comply with the

standards for *in forma pauperis* treatment under 28 U.S.C.§1915; failed to file a timely Reply Brief despite an extension and then attempted to insert their arguments on reply in their transcript access motions; and, most deplorably, launched a charge of financial bias and conflict of interest against a district judge while utterly failing to mention, much less address, the provisions of law governing that serious allegation.

Nevertheless, we decline to grant Baldwin fees for litigating this appeal. Baldwin's refusal to cooperate in providing at least that portion of the transcript in its possession to appellants at the cost of copying is, in our view, poor practice (Baldwin agreed to provide its portion of the transcript to appellants at the $9,000 cost Baldwin paid for transcription). Given this court's urging that the parties cooperate in order to permit the fullest consideration of this appeal, we conclude that the proceedings on appeal were at least in part exacerbated by Baldwin's unwillingness to cooperate. We therefore deny Baldwin's fees for this appeal, although we award Baldwin its costs.

CONCLUSION

The December 9, 1991 and August 25, 1992 Orders imposing attorney fees and costs upon K&A are affirmed. The June 30, 1992 Order permanently barring Mr. Klayman from appearing *pro hac vice* before Judge Keller is affirmed. The trial court's finding that this case was not "exceptional" and therefore did not warrant full attorney fees under the Patent Statute or Lanham Act, is affirmed. Baldwin's request for fees under Fed. R. App. P. 38 is denied. The judgment of the district court is

AFFIRMED.

Costs are awarded to Baldwin.

APPENDIX B - MAY 22, 1996 APPELLATE COURT ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1185, -1186

BALDWIN HARDWARE CORPORATION,
Plaintiff/Cross-Appellant,

v.

FRANKSU ENTERPRISE CORPORATION, FRANK SU and DECORATORS ACCESSORIES, LTD.,

Defendants-Appellants,

and

KLAYMAN & ASSOCIATES, P.C., and LARRY KLAYMAN,

Appellants.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for

rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, GRANTED ONLY TO MAKE THE LANGUAGE CHANGES REFLECTED IN THE ATTACHED ORDER, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on May 29, 1996.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

By /s/
Brian P. LeDuc
Associate Chief Deputy Clerk

Dated: May 22, 1996

APPENDIX C - MAY 22, 1996 APPELLATE COURT ORDER MODIFYING MARCH 4, 1996 OPINION

THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1185, -1186

BALDWIN HARDWARE CORPORATION,
Plaintiff/Cross-Appellant,

v.

FRANKSU ENTERPRISE CORPORATION, FRANK SU and DECORATORS ACCESSORIES, LTD.,

Defendants-Appellants,

and

KLAYMAN & ASSOCIATES, P.C., and LARRY KLAYMAN,

Appellants.

Before NEWMAN, PLAGER, and RADER, Circuit Judges.

PLAGER, Circuit Judge.

ORDER

The panel opinion of March 4, 1996 is modified as specified below:

1. Delete the following language on page 14 of the opinion:

> "As with his previous motions before the district court and this court, his latest submission provides no objective supporting data to support their claims of financial distress or justify this court's taxing the Federal Government with the considerable estimate bill for a complete transcript. A previous "Motion for Access" cites to "[f]inancial information filed under seal" that supports his claims, yet he made no effort to place this information before this court, under seal or otherwise. Also in support of the financial distress claim, the motion appends an exhibit that consists of a blank page with the bracketed statement, "[Contains financial information which has been deleted]." It need hardly be said that this is insufficient. Accordingly, we deny appellants' Renewed Motion for Access to the Transcript."

and replace with the following language:

> -- The documentation Mr. Klayman submitted in support of his claim of financial distress is insufficient to warrant taxing the Government with the considerable estimated cost of obtaining those portions of the transcript not in Baldwin's possession. Accordingly, we deny appellants' Renewed Motion to Access to the Transcript. --

2. Please revise the case citation on page 13, n. 6 of the opinion to read *Weller v. Dickson* instead of *Weller v. Dickinson.*

3. Replace citation to "Fed. Cir. R. 10(a)(1), (2), (4)," with -- Fed. R. App. P. 10(b)(1), (2), (4), --

FOR THE COURT

May 22, 1996
Date

/s/
S. Jay Plager,
Circuit Judge

APPENDIX D - SEPTEMBER 7, 1994 TRANSCRIPT OF ORAL ARGUMENT

THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1185, -1186

BALDWIN HARDWARE CORPORATION,
Plaintiff/Cross-Appellant,

v.

FRANKSU ENTERPRISE CORPORATION, FRANK SU and DECORATORS ACCESSORIES, LTD.,

Defendants-Appellants,

and

KLAYMAN & ASSOCIATES, P.C., and LARRY KLAYMAN,

Appellants.

ORAL ARGUMENT OF
SEPTEMBER 7, 1994

Early Portion of Tape Inaudible

MR. KLAYMAN: -- does not necessarily mean that there is no ongoing appearance of a lack of impartiality in a financial interest. -- case stands for the proposition that if the average

person on the street would view this as a conflict, something that was incorrect, the judge has a duty to recuse himself and that's a mandatory duty.

Baldwin has raised the point that the case was already underway and that would waste judicial resources -- which nullified the court proceeding, even when the parties wanted it to proceed, after the fact, said, no it's not discretionary, the judge has to recuse himself under 455. This is the conflict provision of the law.

Now, we've also stated in our brief, and we make this argument as strongly here, that there was no conduct that was sanctionable. The conduct which was at issue, and we address it point-by-point in our brief and I won't belabor it, was of the type which was the type of advocacy to the extent that there were any errors made, it was inadvertent.

But what's really important here as well, and Baldwin does not refute this, is that the judge's order failed to make the requisite findings as required by law. Those findings has to be that we specifically acted in bad faith and that we intentionally, recklessly, and malicious, in effect, conducted this activity. None of those findings are there. And I know I've made reference, and I don't seek to equate myself to Mr. Steven Yagman in California, though he has raised issues of judicial bias, but in this Yagman case, which we also cite, and I'm going to read you a portion of that, the court said clearly, and this is the 9th Circuit which reversed sanctions orders against Mr. Yagman, Mr. Yagman of course claimed bias and prejudice Judge Keller. It said, at page 628, and this is cited in our motion for access to the transcript, 987 Fed. Rep. 2nd, Yagman v. Republic Insurance, p. 628: "Courts may not invoke these powers, that is to sanction, without a specific

finding of bad faith." This is the 9th Circuit and we're going under 9th Circuit law here, Your Honor.

THE COURT: No, but on numerous occasions, Mr. Klayman failed to explicit Court Orders. I'm reading from the Court's opinion. Why -- and then he goes on to specify the orders that were not obeyed.

MR. KLAYMAN: Your Honor, we went *seriatim* through each of those issues in our briefs and Your Honors will be able to see from those statements, and I'd be happy to address any one if you'd like to raise it, that we did not -

THE COURT: Well, why isn't failure to obey Court's order sufficient basis for sanctions?

MR. KLAYMAN: Your Honor, we maintain that we did not fail to obey. That we were trying to defend our client under difficult circumstances and to the extent that I made objections or speaking motions or whatever, at all times the record would reflect, and there are two provisions of the record which you do have. We weren't able to get the trial transcript, shows that I was very respectful for the Court both when I moved to disqualify the judge, I tried to point out that everyone is human and everyone may not see things. And after he sanctioned me, which he did without a hearing, and there was a denial of due process because I didn't have a hearing and the Evans case and the Potoshnick case stands for the proposition that I should have had an opportunity for a hearing and defend myself before he issued the sanctions orders. Your Honor, you'll see that I was very respectful. We submit we did not disobey orders. There were a few occasions where associates missed a filing deadline and that is not a failure to obey an order.

With regard to discovery, they asked for sanctions, Baldwin, with the magistrate --

THE COURT: -- to provide things within a certain time deadline, why is it not a violation of that order to miss that deadline?

MR. KLAYMAN: Because in this case, Your Honor, there was -- it was inadvertent. We obviously had no reason to miss it. We are a small firm. I had a young associate. I was out of the office. She missed the deadline. She asked Baldwin for permission and they said no problem, but you're going to have to move the court to change the scheduling order. They moved. Baldwin opposed that. We got fined for Baldwin's -- for what the judge termed an opposition. These are things that happen in litigation particularly on a three person firm that is trying to do this on the budget, which -- it's very, very hard. Baldwin spent a million to two million in this case. We haven't even been paid for the time that we've spent.

So, yes, those things happen. But that's not bad faith and that's not reckless and malicious and those are the findings that have to be made to sanction me in this way and these orders effect my whole livelihood. They affect my reputation; they affect our ability to continue; they affect our clients, and that's just simply not fair. Its particularly not fair, Your Honor, when I didn't have a hearing. When the judge, at the end of the trial said, here's how I'm going to sanction you, now Mr. Klayman, you may comment.

Well, that's not the hearing which is provided for the Evans case, and I'd just like to read a little section here, and this is dealing with *pro hac vice* orders.

> If a district court that has evidence of behavior that it believes justified, then denying an attorney admission of *pro hac vice*, it must set a hearing date and give the attorney adequate notice of all incident of alleged misbehavior or unethical behavior that will be charged against him. Specific allegations must be made. General allegations about an attorney's demeanor are insufficient. The hearing must be on the record and present the attorney with an adequate opportunity to defend himself and his professional reputation. The presiding judge must be sensitive to possible conflicts of interest, if events cast him into the role of witness, prosecutor and judge.

Now ironically, they supplemented the record, Baldwin, with a Yagman proceeding. Mr. Yagman had independent judges review his conduct. I did not. I had Judge Keller and he was the judge that respectfully was asked to recuse himself and as we said forth --

THE COURT: Mr. Klayman, you started saying that you had four specific issues in which you thought the judge erred and you started with financial conflict of interest but I don't know what happened to the other three, you want to mention those?

MR. KLAYMAN: Yes, thank you for bringing me back to that, Your Honor.

Conflict of interest, the conduct at issue, number two is not sanctionable because it is --

THE COURT: Number two is what?

MR. KLAYMAN: The conduct was not sanctionable. Three, the judge did not make the requisite findings, bad faith, reckless, malicious. Four, the case was infected with, not just conflict of interest, but *prima facie* showing of bias and prejudice. And there was a denial of due process. And let me address the last point because I was advised by the Clerk that our motion for access to the trial transcript could be taken up at this hearing which is currently pending.

THE COURT: It can indeed, but we are approaching your rebuttal time. Do you wish --

MR. KLAYMAN: I would be willing to go into that Your Honor. That would be okay.

THE COURT: Okay.

MR. KLAYMAN: I understand the rules of the court and respect them. We asked for the trial transcript, Your Honor, because, as you can see from the affidavits of Mr. Goldstein and Mr. Carter, which we submitted with that motion, and Mr. Goldstein is an independent witness, there are *prima facie* showings of extra judicial bias and prejudice. Statements about Mr. Carter and his ilk, who is Jewish. Statements about Mr. Frank Su, as the artful Taiwanese dodger. References to me as Mr. Schmuckler. Your Honor, I've never been one to be sensitive about this, but Schmuck is a Jewish/Yiddish word which means something pejorative. This was constantly referred to. There were statements about the appearance of Baldwin, how they looked so forthright and we did not. Statements like that and Your Honor, I sent in and I stated to the court yesterday a case, U.S. v. Borrero, where, and I just found it in preparing for oral argument, where Judge Keller was reversed for making extra-judicial statements like this on

the record. And I'm just going to quote one portion where he's talking about a Columbian that he sentenced because he was a Columbian, he gave him the maximum sentence and he said, this at page 1354:

> I just finished a case with two Columbian aliens. Not only aliens, illegal aliens. They come to this country and do you know what their view of this country is?

THE COURT: Is this part of our record?

MR. KLAYMAN: Yes, I cited it yesterday and we sent in a supplement, Your Honor of these citations.

THE COURT: This is not our case, right?

MR. KLAYMAN: This is not our case, it's a 9th Circuit case. It's at 887 Fed.2d, 1349, 9th Cir., 1989. They're reversing Judge Keller for discrimination against an Columbian and he stated: "Not only that --

THE COURT: Is there a discrimination against a Columbian in this case? I'm wondering why you're reading these things about a federal judge in my hearing here?

MR. KLAYMAN: The reason is, Your Honor, is because, we're stating that on the record is evidence of bias and prejudice --

THE COURT: I've read the record and I find a hard time reading a statement about a Mr. Carter and his ilk, as being anti-Semitic.

MR. KLAYMAN: Your Honor, there were --

THE COURT: Can you tell me what is anti-Semitic? I read that statement in context as being Mr. Carter and his type of witnesses who might come here and present evidence which I have ordered excluded from this trial. I could not find in my reading anything that suggested anti-Semitism or prejudice and bias.

MR. KLAYMAN: Well, Your Honor --

THE COURT: Those are very harsh allegations to make, Mr. Klayman.

MR. KLAYMAN: They are, Your Honor, we don't make them lightly and it doesn't give many any joy. I have never, ever accused anyone of anti-Semitism in my entire life and I don't wear it on my shoulder. I was married to a non-Jewish person. I am -- my girlfriend is non-Jewish. I don't walk around with that. But when it hits me in the face I have to address it and this court must address these kinds of allegations because, in fact, they exist and we cannot shirk that. And in this instance, the same type of statements were made and I call your attention to page 1354, the Borrero decision and in fact, he called Mr. Borrero, Mr. Borrero and his ilk, in chastising Colombians for not speaking the language, for being here to sell drugs and there was no showing that Mr. Borrero came from Columbia with drugs from that source such that he could sentence him to the highest sentence. The Court reversed and it found a finding that he discriminated based on national origin.

The only reason I raise this, Your Honor, is that under the Doctrine of Completeness, they have cited the record, but have not allowed us the opportunity to ourselves rebut. We thought these portions were going to be in the record, they

were not. They had said, leave that space. We need this Your Honor, to be able to show not just the legal inequities here but there is, as in the Liteky case, which the Supreme Court has and which Baldwin cited, a showing of discrimination based on race and national origin. These things do exist in society. To answer --

THE COURT: Just so I'm clear on something. The base case that you all were litigating has never been appealed, is that right?

MR. KLAYMAN: The -- it has not because the client could not afford that appeal.

THE COURT: And the appeal time has run?

MR. KLAYMAN: The appeal time has run.

THE COURT: That case is over.

MR. KLAYMAN: We're just talking about the sanctions here.

THE COURT: The only reason you're up here is the sanctions issue?

MR. KLAYMAN: Correct, Your Honor.

Now Baldwin has alleged that we should be sanctioned for everything that we did. This is a new allegation. They never raised these allegations with Judge Keller. They're asking that I pay $1 to $2 millions in attorneys fees. But I'm only up here for this. I think you and just to answer your question quickly, Judge Rader, I know I'm out of time, is that this was not the

only instance. This was not the only comment. I was called Mr. Schmuckler. Now, I think we all know what schmuck means. I don't raise that lightly in a court of law. I don't think any judge or person would do that.

There is a showing here. We asked for an opportunity to have Your Honor look at that record and that's something which the judicial process requires. You're my last chance, our last chance, and society's last chance to reverse something which is grossly unfair. We never had a hearing. I was sanctioned at the close of trial without ever being able to put on evidence, get a lawyer, do anything. You are my only hope. Thank you.

THE COURT: Thank you, Mr. Klayman. Mr. McBlaine.

MR. McBLAINE: Last night at 20 minutes after 4:00, I received, as I assume the Court did, a fax with two citations, one of which was this Borrero case alluded to. I think these two cases do not belong in the record. I could have been expected to be on an airplane to the District of Columbia from New York at that time. I was not. I'm prepared to address these cases.

The 9th Circuit --

THE COURT: I don't think cases are in the record, are they? Cases are in the corpus of law that we look at and if we found it or you found it or he found or nobody found it's part of the law world. I don't understand the reference to the record.

MR. McBLAINE: It's from Mr. Klayman's facts. He asked to supplement the record with these cases. But, that

being aside, I agree. These are cases are out there. Judge Keller addressed his dissatisfaction with Columbian drug dealers. The 9th Circuit found that he was in error. They found that it was permissible to, and he sentenced two people differently, the Columbian and the non-Columbian. He increased the sentence of the Columbian. Why? Because the Columbian was from a source country. A doctrine that has been recognized as permissible in the sentencing procedure. The 9th Circuit said, un-huh, you did it wrong, Judge Keller, you should have not looked where the party was from but where the drugs came from. Now they said take it back, and they remanded it to him his review and resentencing. The counsel for the defense said, no, no, don't send it back to Judge Keller, he's the guy that made these statements. They said, we find nothing in the record that suggests that Judge Keller cannot take this up on a reasonable basis and act appropriately on resentencing. We'll give it back to him. We have all the confidence in the world. The thing he did wrong, they spelled out for him to make that same sentence but not by reference to the Defendant's country of origin.

There -

THE COURT: Let me understand something, Mr. McBlaine. I understand that this case is over on the merits?

MR.: McBLAINE: It is.

THE COURT: Was over -- before this appeal even got entered, is that right?

MR. McBLAINE: That's correct.

THE COURT: What do you understand to be this jurisdiction in the case?

MR. McBLAINE: The jurisdiction here is Mr. Klayman's appeal from the sanctions that were awarded to us, the court's order denying him *pro hac vice* status before Judge Keller, and the failure of Judge Keller to recuse himself for financial interest.

THE COURT: I understand those facts --

MR. McBLAINE: But the jurisdictional --

THE COURT: -- the jurisdictional --

MR. McBLAINE: I do not know that the Court is without jurisdiction. It seems to me that orders coming out of the district court during the course of a trial, and they are permeated with, for example, patent issues, section 285, section 282, of the patent statute, are appropriately appealed to this case, so I think the jurisdiction is there.

THE COURT: Now, you're cross-appealing.

MR. McBLAINE: We cross-appealed.

THE COURT: And you're cross-appealing on the grounds that the Judge's conduct or perhaps more accurately, Mr. Klayman' s conduct -- do I have this correct, that Mr. Klayman's conduct was so bad that the judge erred in not sanctioning him more fully?

Mr. McBLAINE: That's correct, Your Honor.

THE COURT: Now that's a function of our knowing what happened in the trial, isn't that right?

MR. McBLAINE: That's exactly so.

THE COURT: Who has the transcript of what happened in the trial?

MR. McBLAINE: Ah -

THE COURT: Is that part of the record?

MR. McBLAINE: It is part of the record.

THE COURT: On this appeal?

MR. McBLAINE: It is not part of the --

THE COURT: There is a transcript somewhere?

MR. McBLAINE: I have three-quarters of the transcript and no more. Mr. Klayman makes the representation that we have the entire transcript and he should be granted access to it. That isn't the case. We have sufficient transcript to support our appeal.

THE COURT: Well, that's your view. You're asking us on the cross-appeal to review the behavior of counsel, and I assume both counsel, at the trial. Shouldn't the transcript be part of the record in this case?

MR. McBLAINE: The transcript, you're very rules provide that the appendix should not be burdened with the entire transcript --

THE COURT: Uh-huh.

MR. McBLAINE: And, indeed, Mr. Klayman makes the misrepresentation that we promised to have the entire transcript in the appendix. Well, we weren't going to do that. We read the court's rules. Mr. Butter sent him a letter and said leave open these numbers that would accommodate the entire transcript, we're going to include the pages to which we cite as the Federal Circuit rules require. Now, as I understand the Federal Circuit rules, the transcript is available under your rules by going to the district court clerk in the District of California. I don't know that Mr. Klayman has ever bothered to do that.

THE COURT: Does the district court have a transcript, is that what you're saying?

MR. McBLAINE: I can't tell you. I don't need to go there. The burden is on Mr. Klayman to get --

THE COURT: No, no, the burden is on this court now because you and Mr. Klayman have both raised to us that the conduct before the trial judge of the lawyers is relevant to some resolution of a dispute between you. We need to know what that conduct was from the beginning to the end. Ordinarily we are only interested in the parts of the transcript that relate to a particular issue on appeal. We don't want all the parts that deal with other issues. That's why we've written our rules the way we have. But what you are two are both arguing about is the conduct over time of both parties, attorneys.

MR. McBLAINE: That's correct.

THE COURT: Do I have that right?

MR. McBLAINE: That's correct.

THE COURT: So you can't be selective and just give us the things you want us to see. We have to see, or I assume we have to know what the conduct over time was of all of the lawyers, unfortunately we have to know that, if we're going to resolve the issues you all have proposed.

Now, somebody must have a transcript. If we want to read the transcript, where do we go?

MR. McBLAINE: You would go to me for three quarters of the transcript. You could go to the -- as I understand the rules, you could go to the clerk of the court who is required to keep the transcript and to make it available -- under the Federal Circuit rules, to a party in order to prepare their appendix. I prepared my appendix --

THE COURT: Isn't it part of the public record if it's filed with the clerk of the court?

MR. McBLAINE: Indeed it is. Mr. Klayman --

THE COURT: Well, then I guess -- would you explain to me what there is about the charge of $9,000.00 or $29,000.00 or whatever the sum is in order to make a copy of the transcript available?

MR. McBLAINE: Our client paid in excess of $30,000.00 for a daily copy of the transcript. In addition to the hundreds of thousands of dollars that they spent throughout the course of this protracted proceeding, protracted by frivolous motions,

abuse of conduct before the court. Our client -- it would be gravely unjust for our client to have to turnover to someone who hasn't satisfied any showing of indigence. I have no more reason to believe Mr. Klayman is indigent than the man in the moon.

THE COURT: Let me go back one step. A copy -- when you say you must go to you, if we want to read the transcript in order to decide the case before us, you say that the only available copy is available from your firm?

MR. McBLAINE: No, Your Honor, I'm saying you could come to me. As I understand your rules, and the rules of appellate procedure, a copy must be in the clerk's office in the Central District of California. It's there for Mr. Klayman. All he needs is a plane ticket to California. He won't -- he won't make the showing to be held in -- he won't pay the $9,000.00 that keeps the reporter in business. She won't hand it over. He tried. Judge Keller wouldn't order his reporter to hand over the transcript but there it is in your rules, that the transcript is lodged in the clerk's office in the Central District of California and it's available to the appellant to make his -- to make his appendix.

THE COURT: So you're saying it's not part of the public record? It must be obtained --

MR. McBLAINE: I believe it is part of the public record.

THE COURT: And I assume we can get it up here any time we want it?

MR. McBLAINE: I believe you can. But if the clerk of the Central District of California has lost is, I'll send you

three-quarters of it. I'll have to go through it and redact our notes and do all of that, which I would have to do if I copies it for Mr. Klayman.

THE COURT: We have a procedure that we can request it and it's sent here within days. Our clerk does this routinely. I've done it on many occasions.

MR. McBLAINE: I'm sorry, Your Honor?

THE COURT: We have a procedure whereby we can request it and it's here within days. That's clear. And district courts keep a version for public viewing as I understand and of course, if you want your own copy, you pay the charges to have it reproduced.

MR. McBLAINE: If this were the most important case of my life, and I didn't have that transcript, and I thought it cost $9,000.00, I'd sell my car, I'd mortgage my house. It cost me a lot more than that to go through law school and it's a big investment. I -- the court has never been satisfied of any *in forma pauperis* showing. It's just -- it's been so weak. There's been no factual showing, no documentation of that.

THE COURT: Do you have anything to say on the merits of the case?

MR. McBLAINE: On the merits, I do. We believe we're entitled to fuller aware of attorneys fees. Why? Because Judge Keller asked us to prepare for him a five-page memorandum setting for the transgressions of the defendants and counsel to permit a motion for him to look, to decide whether a motion would be appropriate. He looked at that and he awarded the sanctions on the basis of that five-page

memorandum. The list of wrongs in this case from start to finish never would fit on a five-page memorandum. Can't be addressed in 15 minutes. A typical -- the on recusal, the standard Mr. Klayman has put before you is incorrect.

On recusal, the leading case is a recently decided Supreme Court case, Liteky. The court finds -- bear with me for a second while I get back to the merits. In Liteky here is what the Court has to say. First, this goes to whether the occurrence have to be extra-judicial. There was an extra-judicial doctrine that was expounded in *United States v. Grinnell*, for example, another Supreme Court case. In Liteky just decided and not in my brief but provided to the Court afterwards with a letter and a copy to Mr. Klayman:

> First, judicial rulings almost never constitute valid basis for a bias or partiality motion. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings or a prior proceedings do not constitute a basis for a bias or partiality motion unless they display a deep-seeded favoritism or antagonism that would make fair judgment impossible.

Indeed, everything that Mr. Klayman cites comes right out of the proceedings.

THE COURT: Sir, I thought you were talking about the assertion of financial bias.

MR. McBLAINE: Oh, one -- I will indeed. On the -- but Mr. Klayman would have you believe that he moved for a recusal on the basis that Judge Keller was an anti-Semite. That never came up until appeal. After Mr. Yagman put

things in the press in California and Mr. Klayman jumped on that bandwagon. On the financial side of this, again, the case cited by Mr. Klayman is not authoritative.

THE COURT: But I thought you --

MR. McBLAINE: The 455(f) is the relevant statutory portion. It allows a judge, if the judge defines that it has a financial interest at the time of trial, or at some time during the proceedings when he has invested a certain amount of his time, if he divests himself of that financial interest, he can go forward with the case. Is there an appearance here of a partiality? My heavens no. No one in their right mind would say that there was partiality when the judge finally learns, at trial, two years later, that two years ago, his mother's trust, and which he's only a remainderman, his mother's trust, had some Masco stock and it was sold before the judge made any single decision in the case.

THE COURT: I always thought -- maybe I'm mistaken that this remitter or whatever it's called, required the consent of the parties.

MR. McBLAINE: Recusal?

THE COURT: No, if there is -- having a financial interest, is, as you know, absolute bar to participation in a case. I always thought that it required the consent of the parties to divest oneself of a financial interest in order to continue.

MR. McBLAINE: Under 455(f), I don't believe that's the case.

THE COURT: Do you -- are you acquainted with the Canons? I don't have them immediately in mind but I wonder if there isn't an obligation?

MR. McBLAINE: I looked only to the statute, Your Honor. And I didn't see any -- but I had in mind the 455(a) which is the appearance of a conflict.

THE COURT: Well, you do know that the Canons are more rigorous than the statute?

MR. McBLAINE: I think even under the canons, there is no question of an interest. At no point in this case, was a decision entered into while the judge has any kind of an interest in the outcome of the case.

THE COURT: I think -- do you have any questions? I think that we're out of time but I believe we have your position, Mr. McBlaine.

MR. McBLAINE: I would like to say that on the question on *pro hac vice*, order --

THE COURT: I do think were out of time. It's in your brief, is it not?

MR. McBLAINE: Yes, it is. Yes, it is.

THE COURT: Thank you. Thank you. The case is submitted. Thank you both.

CERTIFICATE

DEPOSITION SERVICES, INC., hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings of Appeals Nos. 93-1185 and 93-1186.

/s/
Mary Workman, Transcriber

APPENDIX E - AUGUST 4, 1994 AFFIDAVIT OF RICHARD CARTER

I, Richard Carter, declare as follows:

1. I was President of Decorators Accessories ("Decorax"), a U.S. importer of bathroom accessories.

2. I have been in the bathroom accessories and door hardware industries for over 50 years. Previously, my wife Phyllis and I owned Phylrich, a well known and well respected bath hardware manufacturer. The firm was later sold.

3. Decorax was a defendant in the case of Baldwin Hardware Corporation v. Franksu Enterprise Corp., et al., in the United States District Court, Central District of California, Civil Action No. 90-4919 WDK (Bx).

4. It is well known in the industry, and generally, that the bathroom accessory and door hardware industry was primarily owned by Jewish interests. A notable exception is Masco, the parent company of Baldwin Hardware Corporation. I have never been a type of person who was sensitive of anti-Semitic behavior, as I am rather secular and somewhat agnostic. However, during a trial in Los Angeles federal court, with Baldwin, I surprisingly witnessed incredibly discriminatory behavior and ridiculing anti-Semitic comments, by the trial judge. I found this behavior to be extremely disturbing, as I always thought of judges as fair and impartial individuals.

5. The Honorable William D. Keller presided over the trial held in May, 1992.

6. Judge Keller repeatedly screamed at my attorney, Mr. Larry Klayman, and sarcastically and directly addressed Mr. Klayman as "Mr. Schmuckler." The word "Schmuck" is a Jewish/Yiddish term of negative meaning the male genitalia. In my view, Mr. Klayman did not deserve this treatment. He was essentially representing my firm and me for free and he was doing the best he could with limited resources. In my view, Mr. Klayman is both an honorable and honest person who believed in my case and always acted with the highest degree of integrity and professionalism.

7. Judge Keller questioned the integrity and honesty of myself and other witnesses appearing on behalf of Decorax and Franksu, while he simultaneously openly complimented the physical appearance and demeanor of Baldwin's witnesses and counsel. Judge Keller also repeatedly accused Mr Steve Goldstein, our key witness, of lying and continually made fun of his last name by mockingly emphasizing and incorrectly pronouncing the last syllable of his last name - "stein." Judge Keller called me, my family and my colleagues "Mr. Carter and his ilk." I took this as making fun of my Jewish heritage.

8. Judge Keller ridiculed Mr. Frank Su, a Taiwanese manufacturer of bathroom accessories, whose products Decorax imports, by calling Mr. Su the "artful Taiwanese dodger" and on several occasions he mocked Mr. Su's lack of ability to speak English and cast dispersions on his Taiwanese heritage.

9. Judge Keller became extremely agitated with the Chinese interpreter who was interpreting for Mr. Su, for occasional difficulties or delays in making certain translations. Judge Keller would become upset for no apparent reason and

unnecessarily begin to scream at the interpreter. In my opinion, he treated her badly.

9. Judge Keller made unsolicited commentary that some a lot of the attorneys he worked with were Jews (sic).

10. Judge Keller would not allow my attorney to consult with me during court recesses, and incredibly, would not allow my attorney to make objections. This is despite the fact that Mr. Klayman was trying to defend me from charges by Judge Keller and Baldwin's lawyer that I am dishonest and had lied. The lawyers who represented Baldwin were not prevented from making objections.

11. Judge Keller told my attorney that his conduct in Case No. 90-4919 WDK (Bx) could have an impact on a totally separate case that Decorax filed against Baldwin. Judge Keller would be the judge assigned to this case as well.

12. After the trial began, Judge Keller revealed that he held stock in the parent corporation, of Baldwin, while the case was ongoing, which he owned as a beneficiary to his mother's trust. When I found this out, and because of Judge Keller's apparent prejudice, I asked Mr. Klayman to ask the judge to step aside from the case, but the judge refused. I found this incredible, as I thought that the judge would be conflicted and would favor Baldwin as he had an interest in the stock of its parent.

13. As stated above, Judge Keller also accused Mr. Steve Goldstein, the president of one of Decorax's distributors, of being dishonest. Judge Keller repeatedly treated Mr. Goldstein as an inferior person, not only mocking his name but his character. I have known Mr. Goldstein a

long time and in my view he is one of the most honorable and decent people I have ever dealt with. His company -- West End West -- of Laguna, California, is an outgrowth of his long existing, family owned business in Philadelphia. In fact, Baldwin sells to Mr. Goldstein's family and, if it is honest, Baldwin can vouch for his honesty and integrity.

14. I found Judge Keller's biased conduct and statements, which continued throughout the course of the trial and were only directed at defendants and Mr. Klayman, to be extremely troubling, damaging to my case, and I was surprised that this was allowed to happen in a court of law.

Sworn to under penalty of law.

Dated August 4, 1994

/s/
Richard Carter

APPENDIX F - AUGUST 6, 1994 AFFIDAVIT OF STEVEN GOLDSTEIN

AFFIDAVIT

I, Mr. Steven Goldstein, being sworn, state as follows:

1. I am President of West End West, a U.S. importer of bathroom accessories. I have been involved in the hardware and bathroom accessories industry for many years.

2. In May of 1992, I was the key witness for defendants during a trial in the United States District Court for the Central District of California. The case was Baldwin Hardware Corporation v. Franksu Enterprise Corp., et al. and the judge assigned to the case was William D. Keller.

3. My testimony was crucial to the case, as I was very familiar with and had seen bathroom accessory products that had been on the market long before the Baldwin patents were applied for, which were identical to Baldwin's products. Specifically, in April of 1992, I informed Mr. Larry Klayman, attorney for defendants, of a line of bathroom accessories manufactured by Sepco, which were identical to the bathroom accessories manufactured by plaintiff, Baldwin Hardware Corp. Mr. Klayman was surprised and pleased when he received this information.

4. When I testified to this fact at the trial, Judge Keller accused me of "mistaken beliefs."

5. In addition to accusing me of perjury, Judge Keller repeatedly made fun of my last name and pronounced it in a mocking way by emphasizing and mispronouncing the last

syllable -- calling me Mr. Goldstein. I was shocked that a federal judge was mocking me and obviously, the fact that I am Jewish. He also acted as if he disbelieved me about my reason for being late for one day of trial testimony. I arrived late because the train from Irvine to Los Angeles had to stop because a person had jumped onto the tracks near Anaheim and was hit by the train and was killed. The police investigation delayed the train. When I did arrive the judge was in his chambers and was notified. He then kept us waiting about an hour until he decided to take the bench. I firmly believe that the Judge's remarks and attitude about me show anti-Semitic tendencies.

6. I was also offended by Judge Keller's remarks. When I provided my testimony, I swore under oath to tell the truth. I am an ethical and honest businessman, and I am well respected in the bathroom hardware and accessories industry from many years in the industry. Ironically, my family in Philadelphia had done and continues to do business with Baldwin Hardware Corporation. I thus had no reason to not tell the truth at trial.

7. In addition, Judge Keller was very rude to the Chinese interpreter and treated her like an inferior person.

Sworn to under penalty of law.

Dated August 6, 1994

/s/
Steven Goldstein